U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: DEC 0 5 2013 Office: TEXAS SERVICE CENTER File: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Elizabeth M'Cormack

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (director), denied the employment-based immigrant visa petition. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on motions to reopen and reconsider. The motions will be granted, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner is a software design consulting company. It seeks to employ the beneficiary permanently in the United States as a websphere administrator. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petition was not accompanied by a labor certification for the areas of intended employment, in that the petition did not specify multiple alternate worksites. The director denied the petition accordingly.

On September 4, 2013, the AAO dismissed the appeal, holding that no *bona fide* job offer existed as the petitioner's status in the state of New Jersey, the location of proposed employment, was not active; the petition was not accompanied by a valid labor certification with a specific job offer valid for the area of intended employment; and the petitioner failed to demonstrate its ability to pay the proffered wage from the priority date onwards. The petitioner then submitted the instant motion to reopen and reconsider. We will accept the motions to reopen and reconsider the matter based on the new information submitted and arguments made by counsel. Thus, the motions to reopen and reconsider are granted. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The record shows that the motion is properly filed, timely and makes a specific allegation of error in law or fact. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

As set forth in the director's January 8, 2013 denial and the AAO's September 4, 2013 decision, the issue in this case is whether or not the job offered on the labor certification was *bona fide* as the proffered position involved living and working in a different Standard Metropolitan Statistical Area (SMSA) than listed on the labor certification application. In addition, the information in the record indicated that the petitioning business was not active and in good standing with the State of New Jersey, rendering the appeal moot.

Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or aliens of exceptional ability, whose services are sought by an employer in the United States. *See also* 8 C.F.R. § 204.5(k)(1).

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[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

As a threshold issue, the prior AAO decision noted that the New Jersey Business Gateway Services stated that the petitioner's status was not active in the state.[2] The prior AAO decision considered the petitioner's certificate of good standing in the State of Connecticut in determining that the petitioner failed to demonstrate that it is an active entity in the State of New Jersey, which is the location of the proposed employment and held that the petition and appeal are moot. The prior AAO decision dismissed the petition on this basis.

With the motion, the petitioner submits a Certificate of Authority from the State of New Jersey, dated October 4, 2013, stating that the petitioner has the right to conduct business in that state. As a result, that portion of the prior AAO decision denying the petition for mootness is rescinded.

Concerning the area of employment, the regulation at 20 C.F.R. § 656.30(c)(2) provides:

> A labor certification involving a specific job offer is valid only for the particular job opportunity, the alien for whom certification was granted, and for the area of intended employment stated on the Application for Alien Employment Certification form.

The labor certification states that the petitioner's location is in New Jersey and that the "primary worksite (where work is to be performed)" is the petitioner's location in New Jersey. The Form I-140 indicates that the beneficiary lives in Virginia, a location calculated by the director to be 215 miles away from the petitioner's location.

The record reflects that the director sent a Notice of Intent to Deny (NOID) on November 27, 2012[3] noting that the labor certification indicated an address for the place of employment in New Jersey while Internal Revenue Service (IRS) Forms W-2 for 2008, 2009, and 2010 issued by the petitioner indicated that the beneficiary lived in Maryland and pay stubs indicated that the beneficiary moved to Virginia in December 2010. As a result of the beneficiary's residence being so far from the petitioner's location, the director requested evidence "of the actual tasks to be performed by the beneficiary in NJ as well as evidence that [the petitioner had] the necessary facilities to employ the beneficiary on a full-time basis in NJ."

In response, the petitioner submitted a letter dated December 21, 2012 from its President, stating that the petitioner provides consulting services to third parties either from the

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[2] The AAO sent a Notice of Intent to Deny / Request for Evidence (NOID/RFE) advising the petitioner that if its organization was no longer in business, then no *bona fide* job offer exists, and the petition and appeal would therefore be moot. Even if the appeal could be otherwise sustained, the approval of the petition would be subject to automatic revocation due to the termination of the petitioner's business. *See* 8 C.F.R. § 205.1(a)(iii)(D). Moreover, the NOID/RFE advised that any concealment of the true status of the organization would seriously compromise the credibility of the remaining evidence in the record and that independent, objective evidence would need to be submitted to resolve any inconsistencies in the record. *See Matter of Ho*, 19 I&N Dec. 582, 586 (BIA 1988).

[3] The record also indicates that the director issued an RFE on July 20, 2011 and an earlier NOID on August 20, 2012.

headquarters location or at the third parties' offices. Mr. [redacted] further states that the petitioner did not intend the term "place of employment" on the labor certification to mean "worksite." The letter further said that the beneficiary has worked on various contracts in various locations, including [redacted] Ohio, where the beneficiary was working at the time the letter was written. Mr. [redacted] explains that the official place of the beneficiary's employment remains in [redacted] New Jersey regardless of the location where the beneficiary is doing the work. The petitioner submitted pictures of its location in [redacted] NJ and the contract on which the beneficiary was working for the State of Ohio.

The director's decision acknowledged the petitioner's assertion that work at the corporate headquarters would be available to an employee who was not otherwise assigned to a contract to work at a separate location. The director, however, cited the petitioner's failure to provide evidence to show that it would provide work for the beneficiary at its corporate headquarters on an ongoing basis. The director noted that the petitioner did not intend for the worksite to be the same as the place of employment, and additionally found that the labor certification has a specific entry to indicate the "primary worksite" for the proffered position where the petitioner listed only the New Jersey office. The director stated that the petitioner did not submit evidence that the proffered position actually involved work at the corporate headquarters.

The AAO's NOID/RFE cited the director's concerns and requested evidence demonstrating that the petitioner apprised potential U.S. workers that the proffered position involved work in multiple locations throughout the United States through its recruitment materials. In response, counsel reiterated its statement that the petitioner guaranteed work at its corporate headquarters and stated that the petitioner was unable to advertise for other work locations because the work would be done on a non-permanent contract basis in unknowable locales.

The previous AAO decision considered specifically included recruitment materials including advertisements placed in the August 15 and August 22, 2010 *Star-Ledger Classified* sections, the petitioner's internet advertisement, in-house posting, confirmation of the job order from the New Jersey Department of Labor, and a prevailing wage determination from DOL. The advertisements placed in the *Star Ledger,* with the New Jersey Department of Labor, and in-house at the petitioner's office do not contain any indication that travel would be necessary or that the worksite would be in a location other than the corporate headquarters. A July 22, 2013 letter from the petitioner's president accompanying the internet advertisement states that no hardcopy of the internet advertisement was retained, but that the language in the advertisement had not changed since 2010. That internet advertisement states that the position requires "travel/relocat[ion] to various unanticipated locations throughout the U.S . . . for long and short term assignments." This posting would be sufficient to apprise U.S. workers of the actual requirements of the position; however, the accompanying letter does not state that the advertisement was the actual advertisement run for the position, but that the advertisement had changed very little over the intervening three years.

The prior AAO decision found that the application for prevailing wage determination (PWD) was inconsistent with later statements by the petitioner that it did not state other worksites would be required because it did not know where those worksites would be located. The PWD contains a

question in Part a, Block 7 that asks whether travel would be required in order to perform the job duties. The petitioner checked "no" to this question. Similarly in Part c, Block 7, the PWD asks whether work would be performed in multiple worksites within an area of intended employment or a location other than the address listed as the "place of employment." Again, the petitioner checked the "no" box. The prevailing wage determination, therefore, was written for a position requiring no travel or alternate assignments. The position currently being offered to the beneficiary, however, requires travel and assignment to alternate worksites. The prior AAO decision held that the petitioner's representations on the PWD affected the DOL's analysis in determining the true prevailing wage for the position.

On motion, counsel states that travel is not a job requirement of the proffered position. In support of this assertion, counsel cites the letter previously submitted from Mr. [redacted] stating that the beneficiary "has been assigned to work in different locations and is currently assigned to work on contract for the State of Ohio . . . [on] a temporary assignment." The letter further states that the beneficiary "has worked for the [petitioner] on various contractual assignments in a variety of locations," but that the petitioner has always paid the beneficiary's salary and remains an employee of the petitioner, guaranteeing employment at the petitioner's headquarters in New Jersey. The new letter submitted on motion, dated October 1, 2013, on the petitioner's letterhead with no author listed, again states that "when [the beneficiary] will not have a contract, he will be working . . . at [the petitioner's office in] [redacted] NJ." Both letters describe a position in which a worker is assigned to contracts as they become available, regardless of location, with interim work at headquarters. The terms of the labor certification do not support the position as described in the letters from the petitioner.

The previous AAO decision considered *Matter of Paradigm Infotech*, 2007-INA-00003 (BALCA 2007), for the premise that the proper place to file the labor certification application and conduct the recruitment is in the location of the petitioner's principal place of business, i.e. New Jersey, and noted that the actual recruitment conducted must apprise potential U.S. workers of the actual job requirements. The previous AAO decision cited the BALCA decision in *Siemens Water Technologies Corp.*, 2011-PER-00955 (BALCA 2013), in support.[4] As stated previously, the

[4] As examined in the previous AAO decision, in that case, the alien was given the option to work from his residence, which did not necessarily have to be in [redacted] (the location listed on the labor certification), and which greatly expanded the potential geographic location of employment. By listing the location as [redacted] Texas, potential U.S. applicants viewed the job location as less flexible than it actually was. BALCA also has held that travel requirements must be specifically listed on the labor certification and in recruitment materials. *See Riverwalk Educ. Found., Inc.*, 2012-PER-01281 (BALCA 2013) ("the Employer's ETA Form 9089 states: 'Occasional day travel to [redacted] Texas from [redacted] Texas, and back, may be required. No Overnights.' Despite this travel requirement listed on the ETA Form 9089, none of the Employer's recruitment materials, except for its Notice of Filing, mentioned any travel requirements. This is in violation of Section 656.17(f)(4), which requires employers to include in their advertisements any travel requirements listed on the ETA Form 9089."); *Keihin Fuel Sys., Inc.*, 2011-PER-02974 (BALCA 2013) ("Because the record shows that the Employer's NOF did not include the travel requirement

BALCA decisions support the conclusion that the job offer as expressed to potential U.S. applicants did not state the relevant conditions of employment.

On motion, counsel states that the requirement to disclose travel is impossible for the petitioner because of the unknown terms of any such travel. Counsel asserts that the petitioner was unable to answer "yes" to the PWD Part E, section a, question 7 because doing so would require the petitioner to fill out block 7A titled "explain the travel requirements." The petitioner has submitted no evidence to demonstrate that it could not have stated that some contract work would be required in unknown locations for undetermined durations in that box. Similarly, block 7 in Part E, section c requests information "with as much specificity as possible" regarding worksite locations outside of work at headquarters. Instead of indicating that the work was contract based, the petitioner indicated that no work outside of headquarters was required for the position. Counsel states that the DOL would not have accepted answers to these questions without specific locales, however, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The DOL's Frequently Asked Question section indicates that "The employer must provide enough geographic detail about each area of intended employment to cover all known worksite locations by indicating each county (or independent city/town/township/borough/parish, as appropriate) and the corresponding state where the employee will work." At the time the PWD was submitted by the petitioner in 2010, the beneficiary was living in Maryland, so the location of that contract was known and could have been included on the form even if other future contracts were unknown at that point. In addition, the petitioner could have noted on Part H.11 of the labor certification, "Job duties," or Part H.14, "Specific skills or other requirements," that travel would be required for the position. The petitioner took no such action and evidence in the record establishes that travel is required for the position and that such a requirement was not communicated to potential U.S. workers.

As a result, the petition is not accompanied by a labor certification with a specific job offer valid for the area of intended employment. 8 U.S.C. § 204.5(l)(3)(i). The petition will remain denied on this basis.

The prior AAO decision also found, beyond the decision of the director, that the petitioner failed to establish its continuing ability to pay the proffered wage as of the priority date. *See* 8 C.F.R. § 204.5(g)(2).

The AAO's September 4, 2013 decision specifically reviewed a list provided by the petitioner of 37 sponsored workers, including the instant beneficiary, along with the priority date, proffered wage, and actual wage paid in 2011 with the corresponding IRS Forms W-2 indicating a $478,035 difference in 2011 between actual wages paid and proffered wages to these 37 sponsored workers; and the petitioner's 2011 IRS Form 1065, which states a net income for that year of $109,023 and

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listed on the ETA Form 9089, we affirm the denial of labor certification pursuant to 20 C.F.R. § 656.17(f)(4)"). Similar to these cases, potential U.S. workers may want the opportunity to travel or to work at locations other than the corporate headquarters. Conversely, such workers may not want to travel and would be misled by the terms of the recruitment advertising.

net current assets of $105,101. The previous AAO decision thus concluded that the petitioner did not establish its ability to pay the proffered wage to all the sponsored workers. *See Matter of Great Wall*, 16 I&N Dec. at 142. *See also* 8 C.F.R. § 204.5(g)(2).

On motion, counsel states that the petitioner's historic growth of business should be considered under *Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967), in determining the petitioner's ability to pay the proffered wage. Based on a review of the tax returns submitted previously and arguments made by counsel concerning the petitioner's growth in gross income and overall salary and wage payments over the past five years submitted on motion, the petitioner has established its ability to pay the proffered wage under the terms of *Sonegawa* and that part of the previous decisions will be rescinded.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The motions to reopen and reconsider are granted and those portions of the decision of the AAO dated September 4, 2013 noted above, are rescinded. The petition remains denied.